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6 IN THE UNITED STATES DISTRICT COURT
7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 SCOTT JOHNSON,

11 Plaintiff,

No. C 17-02454 WHA

12 v.

13 STARBUCKS CORPORATION, a
14 Washington corporation,

**ORDER RE MOTION FOR
SUMMARY JUDGMENT**

15 Defendant.
16 _____/

17 **INTRODUCTION**

18 In this action asserting claims under the Americans with Disabilities Act and
19 California's Unruh Civil Rights Act, plaintiff moves for summary judgment. For the following
20 reasons, the motion is **DENIED**.

21 **STATEMENT**

22 At all material times, plaintiff Scott Johnson, who had quadriplegia, used a wheelchair
23 for mobility. On at least nine occasions in 2015 and 2016, plaintiff visited a Starbucks store in
24 Danville, California, located approximately ninety miles from plaintiff's home. During these
25 visits, plaintiff encountered a transaction counter crowded with merchandise and displays
26 (Johnson Decl. ¶¶ 2-9).

27 Plaintiff initiated this action in April 2017 and filed the instant motion for summary
28 judgment in August 2018. An order stayed briefing on plaintiff's motion pending resolution of
discovery disputes related to plaintiff's standing to sue. Following plaintiff's production of

1 additional documents, an amended scheduling order set a new briefing schedule. At the hearing
2 on plaintiff's motion for summary judgment, the undersigned proposed inviting the United
3 States Department of Justice to submit an amicus brief on the proper interpretation of Section
4 904.4.1 of the 2010 ADA Accessibility Guidelines (an issue central to the instant motion).
5 After the parties filed statements of non-opposition to the proposal, an order held in abeyance
6 plaintiff's motion pending receipt of the DOJ's amicus brief. The DOJ filed its amicus brief in
7 February 2019 and the parties have each filed supplemental briefs in response (Dkt. Nos. 1, 54,
8 82, 103–05, 115–19). This order accordingly follows full briefing and oral argument.¹

9 ANALYSIS

10 Summary judgment is proper where the pleadings, depositions, declarations, attached
11 documents and other evidence show “that there is no genuine dispute as to any material fact and
12 the movant is entitled to judgment as a matter of law.” FRCP 56(a). On summary judgment,
13 courts must draw all reasonable evidentiary inferences in favor of the non-moving party,
14 including questions of credibility and of the weight to be accorded particular evidence. *Masson*
15 *v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

16 1. AMERICANS WITH DISABILITIES ACT.

17 Title III of the ADA provides that “[n]o individual shall be discriminated against on the
18 basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,
19 advantages, or accommodations of any place of public accommodation by any person who
20 owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. §
21 12182(a). Discrimination includes a failure to design or construct facilities, or make alterations
22 to the maximum extent feasible, that are “readily accessible to and usable by individuals with
23 disabilities . . . in accordance with standards set forth or incorporated by reference in
24 regulations” issued under Title III. *Id.* § 12183(a)(1)–(2).

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27 ¹ Defendant requests judicial notice of the fact that the distance between Carmichael, California and
28 the Starbucks at issue is approximately ninety-six miles. Because this order does not address defendant's
standing argument, this request is **DENIED AS MOOT**. Defendant also objects to the report of plaintiff's expert,
Gary Waters. Because considering the Waters report would not change the outcome of this order, this objection
is **OVERRULED AS MOOT**.

1 Congress tasked the Attorney General with promulgating Title III’s implementing
2 regulations. Congress further provided that these implementing regulations must be consistent
3 with the minimum guidelines issued by the Architectural and Transportation Barriers
4 Compliance Board. *Id.* § 12186(b)–(c). These regulations detail how places of public
5 accommodation are “to be designed, constructed, and altered in compliance with the
6 accessibility standards” set out in the regulations. 28 C.F.R. § 36.101(a). The ADA Standards
7 for Accessible Design (ADA Standards) set out the relevant accessibility standards for
8 evaluating compliance with the statute and regulations. These ADA standards, in turn, are
9 based on the Access Board’s ADA Accessibility Guidelines (“ADAAG”). *Fortyone v. Am.*
10 *Multi-Cinema, Inc.*, 364 F.3d 1075, 1080–81 (9th Cir. 2004). Generally, a facility is “readily
11 accessible to and usable by individuals with disabilities” if it meets the ADAAG’s design
12 standards. *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011).

13 In his motion for summary judgment, plaintiff argues that defendant violated Section
14 904.4.1 of the 2010 ADAAG, which deals with sales and service counters. Plaintiff does not
15 take issue with the height of the counter but instead takes issue with the counter’s length.
16 Section 904.4 requires sales counters to “comply with 904.4.1 *or* 904.4.2.” It is undisputed that
17 Section 904.4.1, which corresponds with a “parallel approach,” applies here. The relevant
18 provisions provide as follows (36 C.F.R. § Pt. 1191, App. D):

19 904.4.1 Parallel Approach. A portion of the counter surface that is
20 36 inches (915 mm) long minimum and 36 inches (915 mm) high
21 maximum above the finish floor shall be provided. A clear floor or
22 ground space complying with 305 shall be positioned for a parallel
23 approach adjacent to the 36 inch (915 mm) minimum length of
24 counter.

25 EXCEPTION: Where the provided counter surface is less than 36
26 inches (915 mm) long, the entire counter surface shall be 36 inches
27 (915 mm) high maximum above the finish floor.

28 Section 904.4.1 and its exception require transaction counters to be “36 inches (915 mm)
high maximum above the finish floor.” Section 904.4.1 further requires that a sales or service
counter be “36 inches (915 mm) long minimum.” But, as explained by the DOJ in its brief,
where the entire counter provided to all customers, including customers with and without
disabilities, is no more than 36 inches high, Section 904.4.1's exception applies. In such a case,

1 an entity need not lengthen a shorter counter to be at least 36 inches. Rather, an entity satisfies
2 Section 904.4.1's exception whenever it provides a transaction counter that is of a uniform
3 height of less than 36 inches. Moreover, the DOJ explains, where a transaction counter, as
4 built, equals or exceeds 36 inches in length, an entity does not violate Section 904.4.1's length
5 requirement when it maintains merchandise or other items on the counter top and therefore
6 lacks 36 inches of "clear" counter space. Rather, the inquiry into whether a sales or service
7 counter satisfies Section 904.4.1's length requirement turns on the length of the counter as built,
8 not on the length of "clear" counter space (Dkt. No. 115 at 6–7).

9 Here, the parties agree that defendant's store has one continuous transactions counter,
10 uniform in height and depth, designed for customers using wheelchairs to make a parallel
11 approach. The counter uniformly measures less than 36 inches high. Two cash registers are
12 located on the transaction counter. Adjacent to each cash register is space provided for
13 customers to make their transactions. The transaction counter is also used to display
14 merchandise (Padilla Decl. ¶¶ 3–7, Dkt. No. 54-11). Although there is not 36 inches of "clear"
15 counter space (due to the cash registers and merchandise displays), defendant has complied with
16 either Section 904.4.1 (if the length of the counter is longer than 36 inches) or its exception (if
17 the length of the counter is less than 36 inches), because the transaction counter is a uniform
18 height of less than 36 inches. Moreover, as explained by the DOJ, Section 904.4.1 "does not
19 mention, let alone require, that an entity provide any particular amount of 'clear' counter space"
20 (Dkt. No. 115 at 5).

21 Perhaps recognizing that courts "must give an agency's interpretation of its own
22 regulations controlling weight unless it is plainly erroneous or inconsistent with the regulation,"
23 *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (citation and internal
24 quotation marks omitted), plaintiff now concedes that "[t]echnically, 904.4.1 does not require a
25 single millimeter of clear, useable space for wheelchair users" (Dkt. No. 119 at 1). Changing
26 course, plaintiff instead argues that defendant violated the ADA by failing to "maintain" the
27 counter in a way that renders the counter accessible.

1 In support, plaintiff relies on Section 36.211(a) of Title 28 of the Code of Federal
2 Regulations. Section 36.211 provides:

3 (a) A public accommodation shall maintain in operable working
4 condition those features of facilities and equipment that are required
5 to be readily accessible to and usable by persons with disabilities by
6 the Act or this part.

7 (b) This section does not prohibit isolated or temporary
8 interruptions in service or access due to maintenance or repairs.

9 Section 36.211(a) merely requires, therefore, that once a facility is brought into compliance
10 with the relevant accessibility standards, that accessibility must be maintained so that persons
11 with disabilities may continue to access and use the facility. Plaintiff's reliance on *Kalani v.*
12 *Starbucks Corporation*, 81 F. Supp. 3d 876, 887 (N.D. Cal. 2015) (Judge Lucy Koh), *aff'd*, 698
13 Fed. App'x. 883, is misplaced. There, the district court rejected the defendant's argument that
14 merchandise on its counters fell within Section 36.211(b)'s exemption for "temporary"
15 interruptions in access because the items were "movable." *Id.* at 885. Inherent in the
16 defendant's argument was the (incorrect) assumption that the placement of merchandise *could*
17 cause a transaction counter to measure less than the legally required length. *Id.* at 884–85. The
18 defendant did not argue, and the district court and court of appeals did not address, the issue
19 squarely confronted by the DOJ in its amicus brief — the length requirement under Section
20 904.4.1 and its exception. As interpreted by the DOJ, and as held herein, the inquiry into
21 whether a sales or service counter satisfies Section 904.4.1's length requirement turns on the
22 length of the counter as built, not on the length of "clear" counter space. It is axiomatic that
23 defendant's obligation to "maintain" the accessibility of its facilities does not impose greater
24 obligations than those obligations imposed by the ADAAG in the first instance.

25 Plaintiff's remaining authorities are inapposite. In *Chapman v. Pier 1 Imports (U.S.)*
26 *Inc.*, 779 F.3d 1001, 1009 (9th Cir. 2015), our court of appeals reversed the district court's grant
27 of summary judgment on the plaintiff's ADA claim regarding an accessible sales counter,
28 concluding that the plaintiff "offer[ed] insufficient evidence that the obstructions on the counter
violated his rights under Title III of the ADA" because "the items on the otherwise properly
accessible sales counter depicted in [the plaintiff's] photographs were not a barrier to the use of

1 the counter by persons with disabilities.” And, in *Fortune v. American Multi-Cinema, Inc.*,
2 364 F.3d 1075, 1082 (9th Cir. 2004), our court of appeals addressed whether the plaintiff had
3 shown that a movie theater discriminated against him by failing to make a reasonable
4 modification in “policies, practices, or procedures” necessary to accommodate his disability as
5 required by 42 U.S.C. § 12182(b)(2)(A)(ii). Plaintiff’s motion, in contrast, is predicated on an
6 alleged failure to remove architectural barriers as required by 42 U.S.C § 12182(b)(2)(A)(iv).

7 Finally, plaintiff references an animated video recently released by the Access Board.
8 The video explains the Access Board’s view that, among other things, “it is important that
9 accessible portions of counters be kept clear of merchandise displays and other objects” (Dkt.
10 No. 119 at 3) (citing [https://www.access-board.gov/guidelines-and-standards/buildings-and-](https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/aboutthe-ada-standards/guide-to-the-ada-standards/animations)
11 [sites/aboutthe-ada-standards/guide-to-the-ada-standards/animations](https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/aboutthe-ada-standards/guide-to-the-ada-standards/animations)). Setting aside that this
12 animated video addresses a two-tiered transaction counter and presents factual circumstances
13 not at issue in this case, plaintiff cites no authority suggesting that the Access Board’s
14 recommendations should be afforded greater weight than the DOJ’s interpretation of its own
15 regulation.

16 In sum, this order concludes that plaintiff has failed to show defendant lacked an
17 accessible transaction counter. Plaintiff’s motion for summary judgment on his ADA claim is
18 accordingly **DENIED**.²

19 **2. CALIFORNIA’S UNRUH CIVIL RIGHTS ACT.**

20 A violation of the ADA is by statutory definition a violation of the Unruh Act. Cal. Civ.
21 Code §§ 51(f), 54(c). To establish a violation of the Unruh Act independent of an ADA claim,
22 a plaintiff must “plead and prove intentional discrimination in public accommodations in
23 violation of the terms of the Act.” *Greater Los Angeles Agency on Deafness, Inc. v. Cable*
24 *News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) (quoting *Munson v. Del Taco, Inc.*, 46
25 Cal. 4th 661 (2009)). “The California Supreme Court has clarified that the Unruh Act
26 contemplates ‘willful, affirmative misconduct on the part of those who violate the Act’ and that
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28 ² This order accordingly need not reach defendant’s alternative arguments that this action is time
barred and that a genuine issue of material fact exists as to plaintiff’s standing.

1 a plaintiff must therefore allege, and show, more than the disparate impact of a facially neutral
2 policy.” *Ibid.* (citing *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005)).

3 As explained above, defendant’s transaction counter met Section 904.4.1’s length
4 requirement and plaintiff has therefore failed to demonstrate a predicate violation of the ADA.
5 Plaintiff does not argue that defendant’s conduct amounted to intentional discrimination.
6 Plaintiff’s motion for summary judgment on his Unruh Act claim is also **DENIED**.

7 CONCLUSION

8 For the reasons stated, plaintiff’s motion for summary judgment is **DENIED**. Under
9 FRCP 56(f)(1), a court may grant summary judgment for a nonmovant after giving notice and a
10 reasonable time to respond. Defendant opposed plaintiff’s motion for summary judgment but
11 did not file its own motion for summary judgment by the deadline set forth in the case
12 management order herein. Nevertheless, having found no genuine dispute of material fact, and
13 having also determined that plaintiff is not entitled to summary judgment on either of his
14 claims, the undersigned is inclined to grant summary judgment for defendant. The parties have
15 until **APRIL 12 AT NOON** to show cause why summary judgment should not be granted to
16 defendant Starbucks Corporation.

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18 **IT IS SO ORDERED.**

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20 Dated: March 29, 2019.


21 WILLIAM ALSUP
22 UNITED STATES DISTRICT JUDGE
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